No. 4917

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

ARTHUR CHRISTENSEN, ROBERT SMITH, and A. C. SMITH,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

Upon Writ of Error to the District Court of the United States, for the District of Oregon

Names and Addresses of Attorneys of Record.

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STATEMENT

The indictment herein consists of four counts. Count One charges a conspiracy to violate the National Prohibition Act. Five overt acts are set forth. The identical overt acts save one are separately charged as counts two, three and four.

Paradoxical as it may sound, the defendants were found guilty on the conspiracy count bottomed on the overt acts separately charged in counts two, three, and four, of which they were acquitted. That is to say, the defendants are not guilty of the crimes when charged as misdemeanors but when the same four misdemeanors are conjoined and charged as a felony they are guilty, i. e.,

they are not guilty of the parts but are guilty of the whole.

Counts two, three and four charge possession, transportation, and sale of liquor. The defendants were agents of the State of Oregon and as such, Point V and the law cited thereunder are most apropos.

During the trial one of the jurors was approached and offered a bribe, and the citations under Point I are invoked as the law of the case.

The defendants were covertly charged in open court with spiriting witnesses out of the state, and the court's attention is directed to Point II and citations for careful consideration.

An argument is inadequate to convey to the court the prejudice done the defendants in the matter of the reception and exclusion of evidence and the court is urged therefore to read the whole transcript in addition to the brief of the plaintiffs in error, who will be referred to as defendants.

POINTS AND AUTHORITIES

I.

In criminal cases attempted bribery of jurors prejudicial to rights of defendants vitiates any verdict against defendants and warrants a new trial.

State v. Morris, 58 Ore. 397.

II.

To charge defendants in open court in the presence of the jury with spiriting witnesses out of the state is conduct so prejudicial to defendants as to warrant a new trial.

16 C. J. 1141.

III.

Where newspaper articles prejudicial to defendants are read to or by jurors a new trial should always be granted.

16 C. J. 1164.

People v. Stokes (Cal.), 42 A. S. R. 102.

U. S. v. Ogden, 105 Fed. 371.

Mattox v. U. S., 146 U. S. 140 (36 L. Ed. 917).

IV.

Verdicts must be consistent.

16 C. J. 1108, and cases.

V.

Officers are presumed to do their duty and if there is any reasonable hypothesis or theory of the evidence as consistent with innocence as with guilt, it is the duty of the court to adopt the theory of innocence and the presumption of duty performed.

Romano v. U. S., 9 Fed. (2nd) 522.

VI.

Erroneous statement of evidence by court inevitably creates prejudice to defendants and requires reversal.

Rossi v. U. S., 9 Fed. (2nd) 362.

Ward v. U. S., 4 Fed. (2nd) 772.

ASSIGNMENT OF ERRORS

There are 23 assignments of error, but for brevity's sake they may be grouped under the following heads:

I. Attempted jury bribing.

II. Misconduct of district attorney prejudicial to defendants.

III. Contradictory verdict.

IV. Admissibility of testimony.

V. Erroneous instructions.

VI. Newly discovered evidence and motion for new trial.

ARGUMENT

To apply correctly the law it is imperative to know the facts. To ascertain the facts it is necessary to comprehend the motive of the dramatis personae. These prerequisites require a recitation

of the origin of this prosecution. The defendants are world war veterans, married, fathers of little children, and never convicted of a crime.

The Governor of Oregon, the district attorney of Marion County, the sheriff of Marion County, deputy sheriffs of Multnomah and Marion Counties and like officials corroborated defendants. The government's main witnesses were felons and bootleggers and some of them paid to testify.

During the times herein mentioned, the defendants were state agents appointed by the Governor to enforce liquor and other laws, except that Bob Smith did not become an agent until after some of the alleged overt acts transpired. The defendants, as officers of the State of Oregon, inaugurated an investigation that unearthed extensive liquor violations. In their campaign of law enforcement one Roy Moore, the king of bootleggers, was encountered.

It was the relentless pertinacity of the defendants and the final destruction of one of the many very large stills of Roy Moore that motivated Moore in bribing his bootleggers to testify against the defendants, hoping thereby to eliminate the defendants from the field of officialdom so that he could continue manufacturing liquor in Oregon in the future as in the past, unmolested and unrestrained either by government or state officials.

I.

Attempted Jury Bribing

While the cause was on trial, the government charged in open court in the presence of the whole jury that one Paul Bradshaw caused a message to be sent to one of the jurors, through one F. W. Mason, containing a proposition to said juror that if a verdict of acquittal were rendered in the cause, a suit of clothes would be awaiting him, the said juror, at Rankin's (Tr. 29). A complaint was issued, Bradshaw was arrested and detained under bond (Tr. 392). On the following morning the information having been called to the attention of the court, the court called the matter to the attention of the jury while in session (Tr. 30). Thereupon, as stated before, the district attorney in open court and in the presence of the jury, stated that Bradshaw tried to bribe one of the members of the trial jury (Tr. 392); that he, the district attorney, had seen Bradshaw in conversation with defendants' counsel in the court room; that Bradshaw had had no connection, no communication, with the government but was under indictment for an identical offense as defendants; and that "if any attempt has been made to bribe a juror it has not come from the government side" (Tr. 394); that "Mr. Watkins is representing Mr. Bradshaw in this case. I assume that he was called into it by Mr. Bradshaw." (Tr. 395); that Mr. Watkins represented Mr. Bradshaw last night after the arrest (Tr. 396). Mr. Watkins was attorney for defendants.

There was no basis in testimony, no evidence, for the remarks and they were improper and highly prejudicial. And the responsibility for the whole unwarranted episode lies at the door of the government.

On this same day the Oregonian printed a front page article about the attempted bribery (Tr. 576-8). It was read by some of the jurors (Tr. 761 and 3). If the truth were known, it was read by all the jurors. (That is the presumption (49 Fed. 32). The juror in question assumed the bribery was in the interest of the defendants (Tr. 763).

Thereafter in chambers a motion was verbally made for an order to discharge the jury and grant a new trial because of the attempted bribery by Bradshaw (Tr. 16). The motion was formally presented later in writing and denied (Tr. 18).

The government was not content to let the matter rest, but in the presence of the court and jury and while one of the defendants was on the witness stand several days later, inter alia, brought on the following colloquy, designated Exception XXVII (Tr. 479):

Q. Now then counsel asked you yesterday if you knew Bradshaw?

A. I don't.

Q. And you answered no.

A. Yes.

Q. Now let me ask you—it may be that you would know him by sight and not by name—let me therefore ask you if you did not see the slender, dark evil-looking individual with very sharp black eyes, who, during the early part of the trial, sat inside the railing immediately behind you, and with whom your counsel was sometimes in consultation?

Mr. Watkins: I object to that because no counsel for the defendant was in consultation with Mr. Bradshaw.

Mr. Stearns: I saw you talking to him here myself.

Mr. Watkins: There was no consultation. Counsel saw him walk up to me, or Mr. Wilson, and say something, or ask something. Now if counsel can consistently on his honor say to the court that he saw Mr. Bradshaw and me in conference, or Mr. Bradshaw and Mr. Wilson in conference, then as a member of this bar I would like to hear him say it now. I was not in conference.

Mr. Stearns: If Your Honor please, I can say in all confidence that I saw counsel talking to this man in the court room, not only once, but two or three times.

Mr. Watkins: You saw me talk to him three times?

Mr. Stearns: I saw either you or your associate

counsel here. Now you asked this question.

Mr. Watkins: I did. I am willing to go into that. I want to go into it.

Court: That is a side issue now, entirely so, and I think we had better drop it here.

Mr. Watkins: I don't want any consultation in here—there was no consultation, and I don't want the defendants—

Court: We are not going into that. I don't think it is necessary.

Mr. Watkins: Well, Your Honor, can I have an exception to the district attorney's remark, as prejudicial, upon consultation, because I am saying there wasn't any. I can't help it because some man comes over here and tells me something, or says something to me, any more than Your Honor could, or Mr. Stearns could.

Court: I think we'd better drop that phase. That is wholly collateral.

Mr. Stearns: Yes, it is, Your Honor.

Mr. Watkins: I would like to ask for an exception upon the district attorney's remark that there was consultation in here with Mr. Bradshaw and one of the attorneys for the defense, either Mr. Wilson or me.

Mr. Stearns: I may say this to Your Honor, that

question was not asked except for the purpose of clearing up a situation that counsel himself created. Now Your Honor knows that I have not attempted at any time to use that incident in the trial of this case. I have not attempted to do so, and I shall ask the jury to absolutely disregard that as being a side issue, having no bearing on this case. But when counsel himself attempts to inject it into the case and particularly after his charges against the government, which he knew to be absolutely false, I thought it proper to clear that situation up and to find out whether this man was telling the truth or not when he testified that he didn't know Mr. Bradshaw.

Mr. Watkins: Now, Your Honor, about this Bradshaw episode, you know the defendants don't know, and the defendants' counsel don't know what Mr. Bradshaw said to the juror.

Court: I don't think we'd better argue that question any further. When the matter came up yesterday you immediately arose to your feet and wanted to make an explanation. The court was not well advised that that was proper, and then you said as to the defendants you wanted to make that.

Mr. Watkins: Yes, I did want to make it.

Court: I said then that if it was as the defendants to show that they had no complicity with it,

it was all right; but then you branched out in the proposition that you were going to prove that Roy Moore was connected with this man. That I thought was improper, but you persisted in it. I think now it is improper.

Mr. Watkins: Do you mean to say, Your Honor, that at no time during this trial can I even show that?

Court: If it comes up in another way you possibly might be able to do it, might be permitted to do it, but it was improper to make it in that way. I didn't intend that you should go into the trial here as between Moore and this man who is accused. It is not proper to go into that case before the jury, and I think we will stop this thing right now. I won't hear further statements from you about it.

Mr. Watkins: I just wanted Your Honor to realize that the defendants have nothing to do with it —no connection.

Court: I won't hear further statements from you about it in the presence of this jury.

Mr. Watkins: All right, Your Honor. I can call my witnesses at the time and then Your Honor can rule at that time. But Your Honor, I still claim the right to have an exception to the district attorney's remark about consultation with me and Bradshaw in this court room, be-

cause it didn't take place; and he made the statement, and I want an exception because I think it is prejudicial.

Court: If the prosecuting attorney is mistaken about that he ought to withdraw it. That is all there is about that.

Mr. Stearns: If Your Honor please, if I were mistaken about having seen these men speaking together in the court room, I would withdraw it.

Mr. Watkins: That is a different proposition, speaking to me. If I speak to Your Honor that is a different thing. If I come up and confer with Your Honor, that is a different thing.

Court: We won't hear anything further on this now.

Mr. Watkins: Well, I would like to have an exception, Your Honor. I think it is prejudicial.

Court: You may have your exception.

It will be observed that the prosecutor started this wrangle without any excuse and without defendants' having said anything to justify him in bringing it up.

The judge even fell into error in commenting on the episode in his opinion denying motion for new trial when he said: "Whether the juror was

influenced one way or the other by the incident was not developed. **The presumption is that he was not.** Neither does it appear that the jury as a whole was influenced one way or the other by it. **The same presumption will obtain in their case."** (Tr. 31.) This is not the law. The presumption always is that error produces prejudice. And the burden is on the prosecution to show that defendants were not prejudiced thereby. (U. S. v. Spencer, 47 Pac. 715; Deery's Lessee v. Cray, 5 Wall. 795, 18 L. Ed. 653; Crawford v. U. S., 212 U. S. 183, 53 L. Ed. 465; U. P. R. Co. v. Field, 137 Fed. 14.)

The danger of prejudice in attempting to bribe a juror is recognized in the case of State v. Morris, 58 Ore. 397, 114 Pac. 476. In that case someone approached one of the jurors at his residence with an offer to bribe him, but in whose interest the bribe was offered does not appear in the record. This same situation was that which faced the jury in the present instance up until the remarks of the prosecutor set forth above. However, State v. Morris is differentiated in this: The juror first took the matter up with the district attorney, who in turn called in the judge, who cautioned the juror not to allow the offer of the bribe to affect in any manner his judgment or consideration of the case on trial. The record in that case also disclosed that the juror repelled the offer of the bribe and all that the judge or counsel did was to ascer-

tain from the juror the facts about the attempted bribing and to try to apprehend the man offering the bribe. This the court rightly held was not misconduct on the part of the judge and the prosecutor. However, the court went on to say, P. 406:

> "No such element of coercion appears in this case. The juror was left free to follow his own judgment. The offer to bribe him **was kept from his fellow jurors.** The record discloses that he acted only as an honest man. If he had yielded or appeared to yield on one hand, or if anything was done which tended to show on the other that the reaction from the offer disturbed his equilibrium as a fair-minded juror, the case would be different; but nothing like that is disclosed by the record."

In the instant case, the entire matter was made known to all of the jurors, and was aggravated by the remarks of the district attorney set forth above. The record discloses very clearly the anxiety of Roy Moore, the principal witness for the government, to convict the defendants and the use of liquor by him to secure witnesses to testify (Tr. 88, 211, 763, 764). The bribe offered was paltry (Tr. 763), and the natural assumption would be that it came from someone whose purpose was to influence the jury against the defendants, as the natural reaction of the jury of any attempt to bribe them would be that the defendants were guilty and were trying to secure an acquittal by means outside

the pale of the law. The rest of the jurors were never informed of the smallness of the bribe. The juror who was approached made the statement that he thought he was approached on behalf of the defendants, as shown by the affidavit of Johnston Wilson (Tr. 761) and the unsigned statement of James E. Lawrence, the juror approached (Tr. 762).

No man can say that the jury was not influenced by this incident. The natural presumption from the every day actions of men and their natural reactions to the subtle influences which all too often are not recognized, is that they were influenced by it against the defendants. It is not an unfair question to ask the court if they would believe under such circumstances, if they were charged with an act of which they were not guilty or even were guilty, and someone approached the jury unknown to them with the proposition of acquittal, that they had had a fair trial before a fair and impartial jury. We do not think that any man would feel that his cause was unprejudiced by such an act. Upon solemn reflection there is no doubt that such an incident would influence the minds of a jury, and the entire panel should have been dismissed and a new trial ordered. For, to quote Judge Rawlston in the famous Scopes case, "Justice is more important than time," and every man, no matter how black his deeds or how steeped in infamy he has become, is entitled to a fair and im-

partial trial before a fair and impartial jury. This has been denied the defendants in the present case.

The foundation of our judicial system is the jury trial, and jury trial can connote but one thing, and that is a hearing in accordance with the rules of law before a fair and impartial jury. Any extraneous influence brought to bear upon the jury that tended in any way to influence the verdict has consistently been held ground for reversal. In the case of Woodward vs. Leavitt, 107 Mass. 459, 9 Am. Rep. 49, which was a case involving statements made by a juror prior to being called as a juror in the case, the court states, P. 56:

> "It has long been settled law that the delivery of any paper by a party or his agent, designedly, and without the authority of the court, to the jury after they have retired to deliberate upon the case, will avoid a verdict in his favor, although the jury swear that they did not read it. Co. Lit. 227 B; Heylor v. Hall, Palm. 325; S. C. 2 Rol. 261; Webb v. Taylor, 2 Rol. Ab. 714, pl. 6; S. C., Stule, 383; Trials per pais, 224; Richmond v. Wise, 1 Ventr. 124, 125. And in Hix v. Drury, 5 Pick. 296, 302, this court accordingly said: 'We are all of opinion that if a paper not in evidence is delivered to the jury by design, by the party in whose favor the verdict is returned, the verdict shall be set aside, even if the paper is immaterial; and this as a

proper punishment for the party's misconduct.' "

In the case of Hilton vs. Southwick, 17 Maine 303, 35 Am. Dec. 253, although the case was affirmed on the ground that no prejudice was shown, the head note states the correct rule of law and quotes:

> "New trial will be granted for misconduct of a juror, when the least attempt appears on the part of the prevailing party, to seek and influence the juror."

Following this case there is a very long note citing a multitude of cases which we desire to call to the attention of the court, particularly the cases set forth on Pp. 256 and 257.

An excellent case to show how the jury should be guarded from extraneous influences is the case of Rigsby vs. State, (Tex.) 142 S. W. 901, 38 L. R. A. (N. S.) 1116, where the jury on a liquor case were permitted to listen to an impassioned speech on prohibition during the noon hour, and the court held that the case should be reversed and a new trial granted. The opinion in this case shows clearly that the court can not ignore influences brought to bear upon the jury in an illegal manner where there is danger of prejudice against the defendants.

The reading of newspaper articles containing statements which would have a harmful effect upon the minds of a jury has consistently in the past

been held grounds for the reversal of a case. In the present case, as shown by defendants' Exhibit D (Tr. 576), the following front page article appeared in the Morning Oregonian, Tuesday, February 9, 1926:

"BRIBERY ATTEMPT ON JURY CHARGED

"Paul Bradshaw Arrested by U. S. Marshals

"Liquor Trial at Climax
Proposition Declared Made to Member of Panel

"BAIL OF $10,000 POSTED

"New Sensation Follows Finish of Government's Evidence in Smith Trial

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"Paul Bradshaw was arrested late yesterday on a charge of attempting to bribe James E. Lawrence, a juror in the conspiracy case against Arthur Christensen and Robert and A. C. Smith, ex-federal and state prohibition agents, now on trial in the court of Federal Judge Wolverton. The arrest was the crowning sensation of the day's progress in the case.

"Bradshaw, according to the information filed by Millar E. McGilchrist, deputy United States district attorney, approached Lawrence yesterday with

a proposition relative to his opinion as a juror. The juror at once brought the matter to the attention of the government.

"Clarence R. Knox and Arthur Johnson, deputy United States marshals, placed Bradshaw under arrest. He was released late last night after Harry Farris and Dr. Francis Drake posted the $10,000 bail which had been set.

Witness Also Missing

"The filing of charges against Bradshaw and his arrest on a charge of attempting to corrupt and intimidate a juror follows the sensational disappearance of Jim Stayton, bootlegger and one of the government's principal witnesses, who dropped from sight a few days before the trial started. Department of justice operatives and deputy United States marshals have conducted a thorough search through the Pacific Northwest for Stayton, but no trace of him has been reported.

"Bradshaw came into prominence in the federal court recently when he was named as one of the dozen or more defendants in what is known as the Max Brill case. He was at liberty under bond of $5000 in this case, which grew out of the seizure of a large quantity of alcohol here by the federal prohibition agents last summer.

Prominent Folk Involved

"Defendants in this case include prominent citi-

zens from all parts of the United States, who are alleged to have been connected with the transportation of alcohol in oil tank cars from the Atlantic coast west. Brill was said to be the leader of this ring.

"Conviction under the provision of the federal penal code dealing with the particular offense with which Bradshaw is charged carries a heavy penalty, including the possibility of a penitentiary term."

The remaining parts of the article deal merely with the report of the day's events at the trial.

The report stated that a bribery attempt on the jury had been charged, that Bradshaw had approached Lawrence, one of the jurors, with a proposition relative to his opinion as a juror and had been arrested charged with attempting to bribe the juror, and that he was held under $10,000 bail. All of this was improper and brought to the attention of the jury matters of which they should have been kept in ignorance.

In the case of People vs. Stokes, 103 Cal. 193, 42 A. S. R. 102, the jury was charged with reading from a local newspaper an article containing a report of some of the events in the case given at the trial, which included a matter of evidence that the court had rejected as inadmissible. That particular article also stated that it was reported that two of the jurors would hang the jury "and that the whereabouts of 'Colonel Mazuma' are also well

known." The court unhesitatingly reversed the judgment and remanded the case for a new trial. At P. 107 the court says:

"It is said in People v. McCoy, 71 Cal. 395: 'There is no doubt, however, that the reading of newspapers by jurors while engaged in the trial of a cause is an inattention to duty which ought to be promptly corrected, and if the newspaper contains any matter in connection with the subject matter of the trial which would be at all likely to influence jurors in the performance of duty, the act will constitute ground for a motion for a new trial. . . . If it be proved as a fact, or may be presumed as a conclusion of law, that the verdict may have been influenced by information or impressions received from sources outside of the evidence in the case, such a verdict is subject to be set aside on a motion for a new trial': See, also, Carter v. State, 9 Lea, 440. Without considering that portion of the article containing a misrecital of the evidence we pass to the extract quoted above. That extract, in effect, states that two men will hang the jury, and that their identity is known to the public. If there were men upon the jury who were wavering as to the character of their verdict it is impossible for this court to say that this article, when read in the jury-room, did not have the effect of directing their final action. We cannot say from an inspection of the record

> that the reading of it by the jurors had no effect upon the character of the verdict rendered. **We cannot say that the verdict of guilty is based wholly upon the evidence introduced at the trial."**

In the case of Griffin v. U. S., 295 Fed. 437, which was a case where one of the jurors had been seen reading a newspaper containing a prejudicial account of the case, the court in reversing the case says (P. 439):

> "It is the right of a defendant accused of crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to withdraw a juror and grant a new trial. (Citing authorities.)"

See also U. S. v. Ogden, 105 Fed. 371.

The affidavit of Johnston Wilson (Tr. 761) stated that two of the jurors had stated definitely that they had read the article but one did not remember whether he had or not, and that these were all of the jurors that he was able to get in touch with. Furthermore, the Morning Oregonian, being the only morning paper in the City of Portland, has a large circulation and is very widely read, and the court would be justified in this case, as the court was in the case of People vs. Stokes, in pre-

suming that the article was read. Furthermore, we call the attention of the court to the fact that there were no affidavits produced by the district attorney in answer to the motion for a new trial, stating that the jury had not read the article or were not influenced by the Bradshaw incident. The natural inference to be drawn from that is that such affidavits, if secured, would have been adverse to the government's case. (Griffin v. U. S., 295 Fed. 437.)

In the case of Ogden v. U. S., 112 Fed. 523, where the original indictment containing an indorsement showing a conviction of the defendant at a previous trial was accidentally allowed to go to the jury room with other papers, the court says (P. 527):

> "Trial by jury is properly surrounded by every reasonable safeguard, to insure the absence of any improper influence that might operate upon the minds of the jurors, and give to their verdict the dignity and respect so important to be maintained in the interest of an impartial administration of justice. It was not necessary, therefore, in our opinion, that the defendant below should have gone further than he did when he showed the presence in the jury room of the indictment with the obnoxious indorsements, and the circumstances under which they came into the possession of the jury. Whether proof that these indorsements were

not read by any of the jury would have brought us to a different conclusion need not now be considered. If it would have such an effect, the burden was upon the defendant in error to produce the proof. The presumption that their presence in the jury room, under the circumstances was injurious to the defendant below, remains until rebuttal by evidence on the part of the plaintiff below."

In the instant case there was no withdrawal of the objectionable and prejudicial observations by the prosecutor. There was no specific instruction by the court that the remarks of the district attorney should not be considered. Their introduction into the case was error and error is synonymous with prejudice.

The usage of the courts regulating trials was departed from, the laws of evidence were violated, the rights of cross examination abridged and the full benefit of trial by jury was denied. It is practically impossible to erase from the minds of jurors observations which arouse passion or prejudice, insinuations of misleading rules or action, or suggestions of immaterial facts. These come within that category.

It is imperative that litigants secure and obtain a fair and impartial trial. This has been denied the defendants. Every person charged with an offense is guaranteed a fair and impartial trial—

a trial in conformity to the laws of the land—and it is the solemn duty of the courts to see that this sacred right is meted out to every man and that in nowise is it abridged or frittered away. As said by Judge Rawlston to Clarence Darrow and William Jennings Bryan in the famous Scopes case of Tennessee: "Justice is more important than time."

Here it is admitted that the jury was tampered with and the juror assumed it was in the interest of the defendants. The other jurors knew of it and nobody can say that that episode has not been prejudicial to the defendants. Can this tribunal affirm this verdict with the abiding conviction that these defendants have been dealt with fairly? Is their conviction **now** more important than justice, or is justice more important than time?

II.

Misconduct of District Attorney Prejudicial to Defendants

The Bradshaw bribing incident in its prejudicial aspect was almost equalled by another episode which occurred while defense was cross-examining one Mitchell, whereupon without rhyme or reason the following prejudicial conduct on the part of the government occurred (Tr. 328):

Mr. Stearns: I may say to Your Honor that if the defendants will produce Mr. Stayton as a witness, we will get that matter cleared up very quickly.

Mr. Watkins: That is the man I would like for them to produce, the government. That is the government's business.

Mr. Stearns: Yes; and that is the man that was gotten out of the state.

Mr. Watkins: By whom?

Mr. Stearns: I have my suspicions, and they are very well founded.

Mr. Watkins: Well, by whom, now? Let a charge be made here.

The Court: We are going to stop that controversy here.

Mr. Watkins: I think that that statement is improper. The district attorney ought to be reprimanded for making a statement of that kind.

The Court: I think you ought to withdraw that statement, Mr. Stearns.

Mr. Stearns: If Your Honor please, I will withdraw the statement, so far as the jury is concerned, but I want to say to Your Honor—

Mr. Watkins: Now he is making the statement over again.

Mr. Stearns: Now just a moment. I want to say to Your Honor that that statement was not made without foundation.

The Court: Well, as that statement was in the

presence of the jury I will instruct the jury not to pay any attention to that conversation between counsel, because it is not evidence in this case. Give it no weight whatsoever; put it out of your minds.

Mr. Watkins: I ask for an exception to the district attorney's remark as being prejudicial and I ask for a showing upon that matter. You can't unring the bell. Now let's make the district attorney make a showing. He is evidently trying to let the jury believe that somebody, probably Watkins or somebody, is running witnesses out of the state.

The Court: Well, the fact appears that the witness is not here. I don't know why he is not here myself.

Mr. Watkins: Well, I would like to let them proceed to make a showing, Your Honor, or else withdraw the statement.

The Court: He has withdrawn the statement.

Mr. Stearns: Counsel brought this matter on himself.

Mr. Watkins: I could not bring it on myself.

Mr. Stearns: Well, but you did bring it on yourself.

The Court: I understand you withdraw that statement?

Mr. Stearns: I withdraw that statement, Your Honor.

The Court: Very well. That is in the presence of the jury.

There can be no question but that these remarks were prejudicial. The court thought so and said: "I think you ought to withdraw that statement, Mr. Stearns." The fact that the statement was withdrawn is not proof that the prejudice created against the defendants in the minds of the jury has been entirely erased. You can not unring the bell. This case is too important even to flirt with that presumption.

This remark was improper, for it was not sustained by the facts. There was no evidence that anyone, but a government witness, had spirited Stayton out of the jurisdiction of the court, whereas on the contrary the evidence shows that Stayton was in jail in the State of Washington and had escaped and was a fugitive, and though the sheriff of Multnomah County, Oregon, was looking for him yet he could not be located (Tr. 624). Furthermore, the defendants had tried to help the sheriff locate Stayton (Tr. 625). On the contrary, Mr. Mitchell, a government witness, testified that he had satisfactory information that another government witness had used money to get witness (Stayton) out of the state (Tr. 334), and another government witness testified that Mitchell told him on January 27, 1926, the day before the case was

to start, that Stayton was right then in Portland (Tr. 116). Despite all this the district attorney in open court and before the jury, charged the defendants with spiriting said witness out of the state, and in so doing committed prejudicial error that warrants a new trial.

It is the duty of court and counsel to guard the jury against the influence of passion and prejudice, and to assure to defendants a fair and impartial trial. An omission by court or counsel to discharge this duty, or a violation of it, is a fatal error because it produces prejudice. A trial is not fair and impartial in which improper charges are made or the assertion or the insinuation of improper conduct. To charge the defendants with spiriting a witness away is to charge them with the obstruction of justice and the commission of a crime. If counsel had attempted and been permitted to try to prove that defendants had spirited a witness out of the state it would have been error. So in making charges as made in the cited episode it was just as fatal (Brown v. Swineford, 44 Wis. 282; State v. Hannet, 54 Vt. 83; Mitchum v. State, 11 Ga. 615; Bullard v. B. & M. R. Co., 64 N. H. 27).

In Brown v. Swineford, 44 Wis., at page 293 (28 Am. Rep. 582) the court says:

> "The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument

on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument. But, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of the circuit courts in jury trials to interfere in all proper cases of their own motion. This is due to truth and justice. And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court."

In Mitchum v. State of Georgia, 11 Ga. 615, 634, the highest judicial tribunal of that state said:

"When counsel are permitted to state facts in argument and to comment upon them, the usage of the courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is therefore denied. It may be said in answer to these views that the statements of counsel are not evidence, that the court is bound so to instruct the jury, and that they are sworn to render a verdict only according to the evidence. Whilst all this is true, yet the effect is to bring the statements of counsel to bear upon the verdict with more or less force,

according to circumstances; and if they in any degree influence the finding the law is violated, and the purity and impartiality of the trial are tarnished and weakened. If not evidence, then without doubt the jury have nothing to do with them, and the lawyer no right to make them. * * * To an extent not definable, yet to a dangerous extent, they are evidence, not given under oath, without cross-examination, and irrespective of all those precautionary rules by which competency is tested."

In State v. Hannett, 54 Vt. 83, 89, it is said that:

"Counsel in their arguments to the jury are bound to keep within the limits of fair and temperate discussion. The range of that discussion is circumscribed by the evidence in the case. Any violation of this rule entitles the adverse party to an exception which is as potent to upset a verdict as any other error committed during the trial."

The rule upon this subject is well stated in Bullard v. Boston & M. R. Co., 64 N. H. 27, 32, 5 Atl. 838, 840, where the Supreme Court of that state said:

"He is legally and equitably bound to prevent his statement having any effect upon the verdict. This he cannot do without explicitly and unqualifiedly acknowledging his error, and

withdrawing his remark in a manner that will go as far as any retraction can go to erase from the minds of the jury the impression his remark was calculated to make. But it is by no means certain that the jury will, at his request, disregard the fact stated. It is necessary they should be instructed that the unsworn remark is not evidence, and can have no weight in favor of the party improperly making it. It is the duty of the wrong-doer to request such instructions. The other party does his duty when he objects to the wrong inflicted upon him, and does not allow it to be understood that he waives his objection."

The prime reason why a defendant is entitled to a new trial upon a verdict of guilty where the prosecutor during the course of the trial has stated and commented upon facts not admissible in evidence and not deducible from the evidence in the case is that such misconduct has deprived him of that fair and impartial trial according to law and the established rules of evidence to which of right he is entitled. Such statements and remarks by the district attorney are unfair and should be suppressed for a jury should be preserved not alone from all improper bias but from even the suspicion of improper bias. The right to a fair and impartial trial is violated by the misconduct of counsel in stating to the jury facts not in evidence or unwarranted thereby, because by so doing he virtually

testifies without having been sworn as a witness (See U. P. Railroad Co. vs. Field, 137 Fed. 14), and without the acid test of cross-examination.

Counsel for the government charged by innuendo that defendants were responsible for the attempted bribery of the juror Lawrence and that counsel for defendants was representing Bradshaw (Tr. 392-396), the latter charge being utterly inadmissible in evidence under any theory of the case, even though it were true, and well calculated to influence the jury to the detriment of the defendants in this case. The statement of counsel in the same passage that counsel for defendants was seen talking to Bradshaw in the court room and the subsequent statement out of a clear sky that counsel had been in consultation with Bradshaw in the court room (Tr. 479) were entirely uncalled for and so highly prejudicial to the cause of defendants that no one can say they had a fair and impartial trial, and in neither instance did the court admonish the jury to disregard the remarks.

Equally prejudicial was the government attorney's charge by innuendo that defendants got the witness Stayton out of the state (Tr. 327-330). The withdrawal of the remark by the attorney was made in such a manner as could only serve to intensify its effect. Nor could the court's remark, "Well the fact appears the witness is not here. I don't know why he is not here myself," (Tr. 330) do other than add to the prejudice already aroused

by the statement of the attorney.

Where an attorney without going upon the stand and submitting himself to cross-examination virtually testifies to facts within his own knowledge or belief, whether relevant or irrelevant to the controversy but in any event highly prejudicial, as the statements here were, the impropriety of the conduct is obvious. It is unfair and illegitimate argument and a reversal should follow whether counsel intended any offense or not. The question should be measured by its effect or probable, even possible, effect on defendants' cause and not on counsel's good or bad faith.

And right here let us say that we do not believe that counsel for the government at any time during this long trial meant to do anything wrong. His heart is right, but in a long drawn out, tedious law suit, a man in the heat of battle will say or do something that in his more deliberate moments he would not think of doing. It just so happens that these things occurred, and since they are prejudicial to the rights of defendants, we submit that since "justice is more important than time," if the defendants are to be convicted and sent to the penitentiary their conviction ought to be on evidence removed entirely from prejudice and collateral matters.

In the case of Turpin v. Commonwealth (Ky.), 130 S. W. 186, 30 L. R. A. (N. S.) 794, although the

facts are not on all fours with this case, the case itself is apropos and the language of the court in its decision squarely in point, not only in reference to the misconduct of counsel but also with reference to permitting the entire jury to become acquainted with the attempt of Bradshaw to bribe one of their number. In this case the court says 30 L. R. A. (N. S.) 797:

> "The matter last quoted, irregular and improper as it was, was probably cured by the admonition of the court. Whether we would have reversed for it alone is not necessary to decide. But the other matter is more serious. It contained a statement of fact not in evidence before the jury, of a most damaging character as affecting the guilt of the accused. It charged that the fact was within the personal knowledge of the presiding judge of the court. When the accused objected to the character of the argument, and his objection was overruled by the judge, it tended to confirm the attorney's statement that the fact existed, and was within the judge's knowledge. It also indicated to the jury that the argument was not improper, which is to say not illegal, and that, therefore, it was a matter which they were at liberty to, perhaps under the duty to, consider. The statement of the attorney was evidence of a clearly incriminatory nature. If one accused of crime flees, or attempts to bribe a witness or a juror, or to

fabricate evidence, all such conduct is receivable as evidence of his guilt of the main fact charged. It is in the nature of an admission; for it is not to be supposed that one who is innocent, and conscious of the fact, would flee, or would feel the necessity for fabricating evidence. Moriarty v. London, C. & D. R. Co. L. R. 5 Q. B. 314; Winchell v. Edwards, 57 Ill. 41; Com. v. Webster, 5 Cush. 316, 52 Am. Dec. 711; Com. v. Brigham, 147 Mass. 415, 18 N. E. 167. Upon the same principle, one who is innocent would not be apt to resort to bribery, either of a witness or of a juror, to insure his acquittal. Consequently, if he resort to that course, it is evidence from which the jury may infer guilt. At least, it is evidence corroborating the other evidence of guilt, and may tend strongly to remove any doubt left in the mind of the jury as to the prisoner's guilt. It would have been competent for the prosecution to have introduced evidence that the prisoner had offered a bribe to a juror to find him not guilty. The evidence is material in character, and is in chief. But, like all other evidence of admissions, it is to be received guardedly. It is a fact explainable, and, whether explained by other evidence or not, is solely for the jury to apply in the light of the surroundings and of the intelligence of the accused. But, in any event, he was entitled to have the witness who testified to such damaging facts against him sworn, and an opportun-

ity for cross-examination, and for counter evidence. In the course pursued in this case, these rights of the accused were denied him. Even though there was no doubt of his guilt, even if it had occurred in the presence of the distinguished trial judge and commonwealth's attorney, it was nevertheless a fact to be proven, if it was to be used against him, like all other facts, by authentic documents or out of the mouths of sworn witnesses confronting him at the bar of the court. Here, his son is charged with having tampered with a juror. It was not shown, nor attempted to be, nor is it claimed, that the prisoner knew of the act, or in any wise authorized it. The young man may have done it on his volition, and out of his anxiety concerning a parent in great trouble. Under such circumstances, criminal though the act be, the prisoner here would be neither legally nor morally responsible for it, and it would not constitute evidence of any kind against him. Yet the effect of the attorney's statement was as if the prisoner had bribed a juror, or had caused it to be done. The circumstance of itself shows the wisdom of the rule requiring the evidence to be heard in court from the mouth of the witness having the knowledge, and subjected to cross-examination, to counter evidence, and to explanation. Furthermore, the trial judge did not claim to have heard what passed between the juror and young Turpin. Nor did he see

any consideration pass. The circumstance and the conduct of the parties were highly suspicious. More, it was in contempt of the rule and orders of the court. Nevertheless, it may have been the result of ignorance or accident, as it was claimed (though of the latter there is doubt) but there was no conclusive evidence of either motive or consequence. It was certainly explainable, and needed explanation. But opportunity was not afforded for refuting or explanatory evidence. The commonwealth's attorney did not claim to have witnessed the transaction. His statement was pure hearsay evidence. On that score, also, it was error to allow it to go to the jury."

We submit to the court that the language just quoted is most apt and particularly applicable to this case.

That prejudicial statements of the prosecuting officer on facts not in evidence is ground for reversal is upheld by a host of cases. Two decided by the Supreme Court of the United States are Hall v. United States, 150 U. S. 76, 37 L. Ed. 1003, and Graves v. United States, 150 U. S. 118, 37 L. Ed. 1021. In the latter case the court says, P. 121:

"In this case the wife was not a competent witness either in behalf of or against her husband; if he had brought her into court neither he nor the Government could have put her upon

the stand, and he was under no obligation to produce her for the purpose assigned by the district attorney, that the witnesses for the Government could see her and identify her as the woman who was said to have been with the defendant in the Indian country before the unknown man's remains or bones were found. Permission to make this comment was equivalent to saying to the jury that it was a circumstance against the accused that he had failed to produce his wife for identification, when, knowing that she could not be a witness, he was under no obligation to do so. The jury would be likely to draw the inference that she was prevented from testifying for her husband because her evidence might be damaging. It was in fact as if the court had charged the jury that it was a circumstance against him that he had failed to produce his wife in court."

Nor does the fact that the court admonishes the jury to disregard the remarks of the prosecutor always cure the error. Where a case is doubtful, as the present one is, or where the remarks were highly prejudicial, as they were in this case—intimating that defendants were responsible for attempted jury bribing and getting witnesses out of the state—no admonition can cure the prejudice that has been aroused. The district attorney is an officer of the United States government and as such he commands high respect in the community,

and the members of the jury are accustomed to look upon him as an official of our government and attach a weight and importance to his words that they would not to the remarks of other counsel. As has been said before, you can not unring the bell, and the seeds sown by the remarks of the prosecutor in this case must have taken so deep root that any admonition would not serve to eradicate the prejudice in its entirety. The prejudice of an honest and upright man who is unaware of it is far more dangerous than a corrupt disregard of rights, for it can not be reached. It is intangible and the man himself would be the first to resent criticism of his conduct and his resentment would be founded upon an honest belief. We believe that the remarks of government counsel in this case, taking all the circumstances thereof into account, would tend to create a prejudice such that, struggle as they may, the jury could not eradicate. The court has well set forth this danger in the case of Latham v. United States, 226 Fed. 420, L. R. A. 1916 D 1118 (See also People v. Derwae, (Cal.) 102 Pac. 266).

Exhaustive notes on the question of misconduct of counsel are to be found in 46 L. R. A. 641 and L. R. A. 1918 D, page 4, especially at Pp. 20, 36, 72 and 73.

III.

Contradictory Verdict

A verdict must be consistent in all its parts, even when the indictment contains several counts (Walsh v. U. S., 174 Fed. 615; Harris v. State, 53 Fla. 37; Tobin v. People, 104 Ill. 564; Rex v. Goodspeed, 55 Sol. J. 273). If the findings on the essential ingredients of the offense are irreconcilable, the verdict must be set aside and a venire de novo be awarded (State v. White Oak River Corp., 16 S. E. (N. C.) 331). If the offense in one count can not be committed without committing the offense alleged in another, a verdict convicting of the former and acquitting of the latter is consistent (Kuck v. State, (Ga.) 99 S. E. 622). Where an indictment in one count charges larceny of a chattel and in another count charges receiving the same chattel with knowledge that it has been stolen, a verdict of guilty of both counts is inconsistent (Com. v. Hoskins, 128 Mass. 60).

Where a count charging that defendant bought and received stolen property with knowledge that it was stolen, in violation of Act. Feb. 13, 1913 (Cong. St. Sec. 8603, 8604), and a count charging him with having the same property in his possession with like knowledge, were based on the same transaction and the evidence proved only one transaction, a verdict finding defendant not guilty on the first count, but guilty on the second count,

was wholly inconsistent, and required a reversal (Rosenthal v. U. S., 276 Fed. 714).

In Peru v. U. S. and Bird v. U. S., 4 Fed. (2nd) 881, a case wherein defendants were found not guilty on counts charging sale and possession of liquor but guilty on the count charging maintaining a nuisance, there being no evidence to support the nuisance except that in support of the sale and possession charges, there was no evidence to support the conviction.

In John Hohenadel Brewing Co. Inc. vs. U. S., 295 Fed. 489, the court said:

> "(1) The brewing company contends that the verdict of guilty on the seventh count cannot stand in the face of the verdict of not guilty on the other counts. If the government relies upon the facts charged in the other counts to sustain the verdict of guilty on the seventh count, the judgment cannot stand, for the jury has found as a fact that the company did not commit the acts therein charged and in that case, the verdict, as defendant contends, would be "inexplicable and inconsistent." Facts that have no legal existence may not support a verdict. The verdict of guilty on the seventh count must be based on evidence other than that pleaded in support of the first six counts. Is there such evidence?
>
> "It is charged that the defendant made sales

on the following dates: In the second and third counts, on January 7, 1922; in the fourth count, on January 5, 1922; in the fifth count, on December 23, 1921; and in the sixth count, on January 9, 1923. The only dates, therefore, alleged in counts from 2 to 6, inclusive, that come within the time covered by the seventh count, January 1, 1921, to January 6, 1922, are found in the fourth and fifth counts. But the verdict of the jury eliminates these from consideration. The same language and identically the same dates are used in the first count as to unlawful manufacture as are used in the seventh count as to unlawful manufacture, sale, and possession, as a basis for the charge of maintaining a nuisance. But, since the jury found in the first count that the defendant did not commit the acts therein charged, they cannot support a verdict in the seventh count. Is there evidence that the company 'manufactured, sold, kept, and bartered' beer 'on or about January 1, 1921, and January 6, 1922, and at divers times between said dates,' without considering the sale charged on January 5, 1922, in the fourth count, and the sale on December 23, 1921, charged in the fifth count? We cannot consider the manufacture of beer within that time because that has been negatived by the verdict in the first count."

Now it must be borne in mind that count one

was based upon five overt acts, and the overt acts numbered two, three, four, and five, charging the possession, sale and transportation of liquor, were separately charged in counts two, three, and four on which counts all defendants were acquitted.

This leaves overt act numbered one wherein defendant Christensen is charged with receiving $250 from Roy Moore. The only other testimony against the defendants is known as the Majewski episode, wherein Christensen and A. C. Smith trapped Majewski into selling them some whisky, he giving them $30 to leave him alone. The court eliminated this from the case by the instructions (Tr. 727 and 745).

Besides, as a matter of law, that episode is beyond redemption because it is an inference based on an inference, i. e., one must infer that (1) Christensen and A. C. Smith as state agents took the $30 illegally, namely, as a bribe, and (2) taking it as a bribe was in furtherance of a conspiracy. As officers of the law they had a right to try to trap Majewski, and if he tried to bribe them, they had a right to take the money and hold it as evidence to be used against him. And the rule of law laid down in Point III is to the effect that if there is any reasonable theory of the evidence as consistent with innocence as with guilt it is the duty of the court to adopt that theory as well as the presumption of duty performed (Romano v. U. S., 9 Fed. (2nd 522). Furthermore, this episode in no

wise affected the federal government and could not be considered as in furtherance of a conspiracy to violate the National Prohibition Act.

We therefore have for consideration overt act one, because the jury have found that the defendants were not guilty of any of the other overt acts. Now, what is overt act one? The most than can be said for it is that it is a bribe of a state officer. It in no wise constitutes an overt act in furtherance of the conspiracy. It occurred in May and Bob Smith was not even a state agent at that time as he was employed in June, 1925 (Tr. 488). And A. C. Smith knew nothing about it as Moore had never met him (Tr. 214). Now an overt act must be a subsequent independent act following the conspiracy (U. S. v. Richards, 149 Fed. 443). The offense does not consist of both conspiracy and the acts done to affect the object of the conspiracy, but of the **conspiracy alone** (U. S. v. Britton, 108 U. S. 199). A person who was not a party to the previous conspiracy cannot be convicted on the overt act (U. S. v. Cole, (Tex.) 153 Fed. 801). Where the overt act took place after conspiracy had been consummated, it was held to be ineffective as an overt act to constitute such offense (Ex p. Black, 147 Fed. 832 and U. S. v. Elvycott, 182 Fed. 267). Where, by statute, an overt act is made essential to a conviction for conspiracy, evidence of acts committed prior to the formation of the conspiracy is not admissible to establish the commission of the offense (12 C. J. 637).

The indictment charges "that after the formation of said conspiracy" (Tr. 8) said defendants "have done and caused to be done certain acts" (Tr. 9). Hence the conspiracy had to be formed prior to the May, 1925, episode, which fact eliminates Bob Smith because he was appointed a state agent in June, 1925, prior to which date he had no connection with Christensen and A. C. Smith. Now if it be contended that the conspiracy was formed after Bob Smith became a state agent, and it is so alleged (Tr. 6), then the facts surrounding overt act one cannot be used to convict any of the defendants, because under the federal statute an overt act is made essential to a conviction for a conspiracy and evidence of acts committed prior to the formation of the conspiracy is not admissible to establish the commission of the offense (Dealy v. U. S., 152 U. S. 539; 38 L. Ed. 545). Furthermore, we contend that the taking of $250 by Christensen, admitting for the sake of the argument that he did take it, was not in any sense an offense against the United States. He was a state agent, he had nothing to do with federal enforcement and could not by the taking of a thousand bribes desist because he had no right to insist. Furthermore if he did, it was not a part of a conspiracy because the other two defendants knew nothing of it and one was not a state agent at the time.

IV.

Admissibility of Testimony.

To comprehend the applicability of certain proffered testimony excluded by the court and the prejudicial result thereof, it is necessary to know the atmosphere in which this prosecution was born and the animus attending its development.

The defendants are world war veterans and on the termination of the war sought employment here and there so as to support their wives and small children. Employment in the prohibition unit of the government brought them in contact with J. A. Linville and Frank Mitchell. In the handling of liquor, disputes, antagonisms and quarrels arose resulting in hostility and hatred. Charges and counter-charges, frameups and double-crossing occurred and continued, or at least the parties labored under that impression and with that resentment.

The defendants severed their connections with the government and sometime thereafter became agents of the State of Oregon appointed by the Governor. They worked in conjunction with various sheriffs, deputy sheriffs and district attorneys in the detection, destruction and prosecution of stills, bootleggers and liquor manufacturers.

The king of bootleggers, one Roy Moore, was and had been operating in the State of Oregon

for years without interference on the part of government or state officials, and, as the defendants thought, by virtue of protection vouchsafed by government, state, and city officials. The defendants decided to determine why Moore could operate in such flagrant violation of law and if possible stop it, stop Moore, and prosecute those responsible therefor and connected therewith.

The defendants knew Linville was hostile to them and labored under the impression that he had tried to frame at least one of their number. They assumed that he would stoop to anything to bring about their conviction. In this frame of mind they desired to ascertain if he would state the truth about liquor being taken from the customs house by various agents.

Assignment IX.

The court refused to let the taking of liquor from the customs house be inquired into and in doing so prevented defendants from showing matters that generated the feelings of hostility on the part of Linville toward them and from laying a foundation for impeaching his testimony (Tr. 185), thereby committing error to the prejudice of the defendants.

Assignment X.

As state agents the defendants cooperated with the district attorney and/or the sheriff or his deputies in the particular county in which they

might be operating. While operating in Multnomah County they conferred and cooperated with George Hurlburt. When they encountered Majewski, Hurlburt was out of the state and did not return nor did they see him until after their indictment by the grand jury. The defendants had taken the $30 and placed it that same night with Hart to hold for Hurlburt. The moment they saw Hurlburt they told him about it but the court refused to let them ask Hurlburt anything about the matter and denied them the benefit of having Hurlburt tell the jury what he and the defendants said (Tr. 191). There is no proof that the defendants knew at the time they met Hurlburt on his return to the state that the grand jury had indicted them. But be that as it may, the censure would go to the credibility and not to the admissibility of Hurlburt's testimony.

Assignment XII.

It must be borne in mind that Roy Moore was the king of bootleggers and plying his trade in Oregon unmolested by any government official; that large sums of money, perhaps from $10,000 to $20,000, were invested in each still; that the defendants were the only ones that interfered with Moore; that the defendants are accused of being paid to let Moore alone and not report on him. At this very time they were reporting to Hurlburt and desired to show the jury that salient fact by that government official to whom they reported

from time to time—and about a thing that was in existence during the time the government now contends the conspiracy was in operation. It is unlikely that they would take $250 from Moore and, before they are paid the other $250, report him to Hurlburt and destroy the goose that was to lay the golden egg. To prevent them from showing this was a denial of their rights and a prejudicial ruling warranting a reversal (Tr. 184).

Assignment XIII.

The testimony will disclose that the defendants located the still in question and tried to get men from Linville and Mitchell and others, but for one reason or another secured no help and thereupon proceeded alone; that on arriving at the still they found no kegs of liquor, nor did the deputy sheriffs of Marion County, nor any other official, though thorough search was made; that thereafter Moore and his bootleggers reported to Linville and Mitchell that liquor had been found on the island and contended that the defendants secreted said kegs so as to sell the whisky later on.

To show the practice and custom of bootleggers and still operators in hiding the liquor as it is run off and cacheing the same away so that if the still is located they will at least save the whisky distilled, the defendants wanted to show the jury that very likely Moore's crew had concealed the kegs of liquor as it was run off, and to do so had

called George Hurlburt, a government official who was wise as to said practice, but the court said no (Tr. 197). If Hurlburt had been permitted to answer, he would have said bootleggers always concealed their liquor after distilling it and prior to shipment so as to prevent its destruction in case the still were discovered (Tr. 199).

The layman is not wise as to the tricks of this trade, and the jury might have assumed that the defendants did hide this liquor so as to realize a profit out of it later on, whereas if Hurlburt had been permitted to tell them what the practice is, they might have resolved the matter to the benefit of the defendants. Anyway, they should have been given the testimony and the withholding of it from them was error and lies at the door of the prosecution (Tr. 198).

Assignment XVI.

The animus, hostility and hatred of Frank Mitchell for the defendants permeates the whole case and the extent to which his spleen drove him is seen by Exception XVI. The defendants tried to show that this man had suggested to one McFarlane that he could color or change his testimony. The prosecution was quick to intercede and error was made in not allowing the defendants the privilege of showing to the jury the conduct of this witness (Tr. 305).

Along the same line defendants tried to question witness Mitchell by asking him if he had

not taken liquor to Reed College and if he had not testified before the grand jury that he had despite the fact that earlier he had said that he had not taken liquor anywhere but to federal court to the chemist for analysis. The court refused the latitude to which defendants were entitled and in so doing committed error to their prejudice.

Furthermore at the same time the defendant's rights were raped when the district attorney practically accused them of driving a witness out of the state despite the fact that there was no evidence to that effect but on the contrary that a government witness had paid money to get Slayton out of the state.

Assignment XX.

The error contained herein is of a vicious nature, so palpably prejudicial that the court is asked to turn to Page 328 of transcript and there read it and see if it does not strike at the very foundation of society itself, pregnant with prejudice, and ipso facto warranting a reversal.

Assignment XXIII.

Defendants recognize the discretion allowed the trial judge to control the proceedings, but, with all due respect to the presiding judge, submit that defendants did not get the freedom guaranteed them by the law of the land when they were denied the right to further cross-examine. The appellate

court is urged to read the proceedings (Tr. 356-358), to see if defendants' rights were vouchsafed them. We claim it was error. The widest range and greatest latitude in a serious case of this nature should be given defendants. Again we assert, "Justice is more important than time."

Assignment XXV.

Nobody can grasp this assignment in all its prejudice and passion without reading (1) defendants' motion; (2) article from Oregonian; (3) affidavit of Johnston Wilson; (4) unsigned statement of jurors who read newspaper article; (5) unsigned affidavit of juror who was approached and offered a bribe; (6) statement of court and district attorney in presence of jury (Tr. 392).

Assignment XXVI.

This assignment of error alone warrants a new trial. Jury bribing, or any attempt, with all the prejudicial conduct and remarks as occurred in this case, impels a reversal, because no man's liberty should be gambled with, and surely no court can say that beyond doubt no prejudice arose against the defendants by virtue of this episode (Tr. 392 et seq.).

Assignments XXVII, XXVIII, XXX, XXXIII and XXXIV.

Witness Linville had been asked by the government if he had sent "any agent anywhere to frame

anybody," and had been permitted to say that he had not (Tr. 180 and 190); also had not sent any whisky anywhere but to federal court. When defendant got on the stand he was not allowed to answer or be asked anything about the same thing. If the court had let the same questions be asked defendant as the government had been permitted to ask its witness, he would have said Linville had falsified and had tried to get him to frame on another government official and had tried to frame on him, Christensen (Tr. 399, 403, 404), and had sent liquor to Astoria to Agent McKnight to drink (Tr. 431). Furthermore, witness McMills would have testified that he had seen Linville give other fellows liquor at the customs house; that Linville had given it to him; that he had seen Linville drink; also that Linville had desired to frame the defendants and get rid of them (Tr. 571, 572 and 573).

Assignment XXXI.

No argument is needed to show that the following remarks occurring before the trial jury were prejudicial to defendants and error sufficient to grant a new trial:

Mr. Stearns: Now let me ask you—it may be that you would know him (Paul Bradshaw) by sight and not by name—let me therefore ask you if you did not see the slender, dark evil-looking individual with very sharp black

eyes, who, during the early part of the trial, sat inside the railing immediately behind you, and with whom your counsel was sometimes in consultation?

Mr. Watkins: I object to that because no counsel for the defense was in consultation with Mr. Bradshaw.

Mr. Stearns: I saw you talking to him here myself.

Mr. Watkins: There was no consultation. Counsel saw him walk up to me, or Mr. Wilson, and say something, or ask something. Now if counsel can consistently on his honor say to the Court that he saw Mr. Bradshaw and Mr. Wilson in conference, then as a member of this bar I would like to hear him say it now. I was not in conference.

Mr. Stearns: If Your Honor please, I can say in all confidence that I saw counsel talking to this man in the court room, not only once, but two or three times.

Mr. Stearns: You saw me talk to him three times?

Mr. Stearns: I saw either you or your associate counsel here. Now you asked this question.

Mr. Watkins: I did. I am willing to go into that. I want to go into it.

Court: That is a side issue now, entirely so, and I think we had better drop it here.

Mr. Watkins: I don't want any consultation in here—there was no consultation, and I don't want the defendants—

Court: We are not going into that. I don't think it is necessary.

Mr. Watkins: Well, Your Honor, can I have an exception to the District Attorney's remark, as prejudicial, upon consultation, because I am saying there wasn't any. I can't help it because some man comes over here and tells me something, or says something to me, any more than Your Honor could, or Mr. Stearns could.

Court: I think we'd better drop that phase. That is wholly collateral.

Mr. Stearns: Yes, it is, Your Honor.

Mr. Watkins: I would like to ask for an exception upon the District Attorney's remark that there was consultation in here with Mr. Bradshaw and one of the attorneys for the defense, either Mr. Wilson or me.

Mr. Stearns: I may say this to Your Honor, that question was not asked except for the purpose of clearing up a situation that counsel himself created. Now Your Honor knows that I have not attempted at any time to use

that incident in the trial of this case. I have not attempted to do so, and I shall ask the jury to absolutely disregard that as being a side issue, having no bearing on this case. But when counsel himself attempts to inject it into the case and particularly after his charges against the government, which he knew to be absolutely false, I thought it proper to clear that situation up and to find out whether this man was telling the truth or not when he testified that he didn't know Mr. Bradshaw.

Mr. Watkins: Now Your Honor about this Bradshaw episode, you know the defendants don't know and the defendants' counsel don't know what Mr. Bradshaw said to the juror.

Court: I don't think we'd better argue that question any further. When the matter came up yesterday you immediately arose to your feet and wanted to make an explanation. The Court was not well advised that that was proper, and then you said as to the defendants you wanted to make that.

Mr. Watkins: Yes, I did want to make it.

Court: I said then that if it was as to the defendants to show that they had no complicity with it, it was all right; but then you branched out in the proposition that you were going to prove that Roy Moore was connected with

this man. That I thought was improper, but you persisted in it. I think now it is improper.

Mr. Watkins: Do you mean to say, Your Honor, that at no time during this trial can I even show that?

Court: If it comes up in another way you possibly might be able to do it, might be permitted to do it; but it was improper to make it in that way. I didn't intend that you should go into the trial here as between Moore and this man who is accused. It is not proper to go into that case before the jury, and I think we will stop this thing right now. I won't hear further statements from you about it.

Mr. Watkins: I just wanted Your Honor to realize that the defendants have nothing to do with it—no connection.

Court: I won't hear further statements from you about it in the presence of this jury.

Mr. Watkins: All right Your Honor. I can call my witnesses at the time and then Your Honor can rule at that time. But Your Honor I still claim the right to have an exception to the District Attorney's remark about consultation with me and Bradshaw in this court room, because it didn't take place; and he made the statement, and I want an exception because I think it is prejudicial.

Court: If the prosecuting attorney is mistaken about that he ought to withdraw it. That is all there is about that.

Mr. Stearns: If Your Honor please, if I were mistaken about having seen these men speaking together in the court room, I would withdraw it.

Mr. Watkins: That is a different proposition, speaking to me. If I speak to Your Honor that is a different thing. If I come up and confer with Your Honor, that is a different thing.

Court: We won't hear anything further on this now.

Mr. Watkins: Well, I would like to have an exception. Your Honor, I think it is prejudicial.

Court: You may have your exception.

Assignment XXXVI.

The district attorney in open court and before the trial jury had accused the defendants of getting witness Stayton out of the state. H. Christofferson, chief criminal deputy sheriff of Multnomah County, if permitted would have testified that during the trial of this case the defendants had tried to help him in finding and apprehending the witness in particular (Tr. 624). Surely the court should have allowed the defendants to do everything within their power to overcome the prejudice

the improper conduct of the district attorney had brought upon them, but to no avail. This was error.

Assignment XXXVII.

Witness Linville was asked about the raid and told how soon he turned it over to Mitchell after Roy Moore came to the customs house and reported the finding of whisky on the island. Now it appears that Mitchell had the case all worked up and that he admitted it was a frame-up (Tr. 667), and refused to have anything to do with it (Tr. 667). The testimony should have gone to the jury; the vice of it, if any vice exists, goes to its credibility and not to its admissibility.

Assignment XXXVIII.

A most peculiar set of circumstances envelop this contention of error. The defendants contended all along that Roy Moore had peculiar connections with officials. The fact that he was able to operate huge stills and sell liquor by the wholesale in the State of Oregon without restraint lent color to the charge. After the defendants located and destroyed his still on July 8th, he met Linville and Mitchell on July 11th and made an agreement with them wherein he was given immunity. Along toward the end of the case it was accidentally learned from a third party (Tr. 704) that the agreement between Moore, Mitchell and Linville to trap the defendant Christensen was in

writing. The defendants demanded its production as the best evidence of what it contained. The court would not require the government to produce it and defendants had to content themselves with the verbal promise of the prosecutor to the effect that "I will see if I can get it" (Tr. 707). It was never produced.

V.

Erroneous Instructions on the Facts

Assignment XL

The court among other things instructed the jury as follows (Tr. 735):

> "It seems that prior to the appearance of these men, who were the defendants, as now conceded by them, there was rumor in the vicinity of the still located on the island or somewhere about, or a sort of suspicion that had gotten into the air. J. F. Roy, a state prohibition officer, and the father of Elwood Roy, the son, concluded to do some detective work on his own behalf, and sought employment in the Kerr neighborhood on the east side of the river opposite the island, his purpose being to keep a lookout and run down any suspicious movements he might observe. His story has been related, and you have heard it from the witness stand."

The court's comments on the facts were intro-

duced by the following words (Tr. 732): "There are some things material to the trial about which there is little or no dispute." The paragraph immediately preceding the one quoted above reads (Tr. 734):

"Having given attention to the ownership and proprietorship of the stills and where located, naturally and logically the next inquiry will be respecting their discovery, and the first raid that was made in pursuance thereof. It is conceded by the defendants that they visited the stills on the evening of the 7th of July, 1925. This is in apparent harmony with what is related by Mr. Anderson and Elwood Roy. Anderson, you will remember, was the party, as the evidence tends to show, who was working for Moore in the operation of the stills, and who, having observed three men on the east bank of the river, became suspicious and shut down the stills. You will recall the testimony of Anderson relative to leaving the island in a boat with his two companions, one of whom was called 'Dad,' and proceeding down stream, and finally landing on the Yamhill County side, and in the meanwhile being accosted by one of the three men and directed to come in, and of having heard a number of shots fired by the men, one or more of them. The incident is confirmed by defendants themselves and you have their testimony concerning it for your consideration."

The effect of the whole matter is to leave to

the jury the impression that it was conceded that Elwood Roy was doing detective work. This was far from the case. It is true that the witness himself so testified (Tr. 350) and was corroborated in this by his father, J. F. Roy (Tr. 358). However, the actions of the witness himself and confusing account of where he was working (Tr. 348); his hunting for squirrels with an automatic pistol (Tr. 352); his failure to recognize the roaring of the boilers (Tr. 351); throw a suspicion upon his story. In addition to this, defendants all testified that they thought young Roy was the lookout for the still (Tr. 450, 676) even though they admitted they had not sufficient proof for conviction (Tr. 531, 676). They also testified to Roy's peculiar conduct when they met him (Tr. 416, 495, 651).

The effect of the instruction of the court was tantamount to an instruction that Elwood Roy was doing detective work in the neighborhood of the still. This fact was disputed and the court should so have instructed, as he did on other disputed questions. The importance of this lies in the fact that Elwood Roy was the only major witness for the prosecution who was not a confessed bootlegger or the boon companion and associate of bootleggers. Roy's testimony, if believed by the jury, is very damaging to defendants' case and any instruction by the court that tended as this did to strengthen the belief of the jury in the faith they might place in the testimony of the witness was

highly prejudicial to defendants. The court's failure to instruct that Elwood Roy's purpose in doing detective duty was disputed would naturally lead the jury into the assumption that he was a disinterested witness and his testimony along other lines therefore of more trustworthy character than if he had been interested in behalf of Roy Moore.

Assignment XLI

In commenting on the testimony relative to the visit of A. C. Smith to Portland on the night of July 7th, the court said (Tr. 738):

> "A. C. Smith's testimony in this respect does not agree with the testimony of the boy Elwood Roy, Gibson, Baker and Hart, and you will give careful consideration to the testimony of A. C. Smith in connection with that of these four witnesses for the government, for ascertaining why the four men from Portland were there, and what was their purpose in being there; whether A. C. Smith was instrumental in securing their presence, and, if so, why he wanted them there. Smith admits that he talked with Hart while in Portland that night, and that he told him (Hart) of the raid, but denies that he saw any of the other men—Gibson, Stayton or Baker. But the fact is admitted that all four of these men were there, and all went on the island, and were there on the island for a period of time with A. C. Smith and Bob Smith. This

was in the early morning of the 8th, and before either of the deputy sheriffs from Salem had appeared on the scene. The four men had departed before the officers came. So you will inquire in particular what the real facts are respecting the purpose of these men in being on the island after the defendants had made the raid, and what was the purpose of the defendants, Smith brothers, in having or allowing, or permitting them to be there, and what part, if any, the defendants had in securing their presence."

The purpose of the visit of Hart, Baker and the two bootleggers to the island on the morning of July 8th is of vital importance to the correct decision of the case. The court's observations therefore on this point would be accorded great weight in the minds of the jury. The story of this as told by A. C. Smith (Tr. 653-5, 677-80), differs materially from that of Gibson (Tr. 77-79, 99-100) and Baker (Tr. 158-160, 166). The testimony of Hart accords with that of A. C. Smith to a large extent (Tr. 130-132, 145), while the testimony of Elwood Roy does not agree with that of any of the other four witnesses (Tr. 343-6, 353-5). We wish particularly to call the court's attention to the fact that Elwood Roy was the only witness who testified that A. C. Smith talked with anyone else than Hart on the night of July 7th, and that the testimony of Hart is in agreement with that of A. C. Smith

in respect to the happenings in Portland and also to the effect that A. C. Smith was not overtaken at Newberg. In this state of the evidence the statement of the court served only to belittle the weight of the testimony given by A. C. Smith and because of the importance of this particular phase of the case the cause of defendants was undoubtedly prejudiced thereby.

Nor did the court remove this prejudice by the charge (Tr. 754):

> "You, gentlemen of the jury, are the judges of the effect of the evidence. The court gives you the law and you take that from the court and apply it implicitly; but when it comes to determining what the testimony in the case proves, what the facts are, that is a matter for the jury and not for the court."

It is true of course, theoretically, that the jury is the sole judge of the facts of a case, but to put the theory into practice it is necessary for the court to refrain from misinterpreting testimony. That the court's misinterpretation here was not intentional we know, but a jury places great weight in the opinion of the court and are inclined to believe the court's memory of the matter, and take it in preference to their own impressions of the testimony. If a juror should perhaps be somewhat uncertain as to just what the testimony given by a particular witness on a particular point was, he would in all probability take the version of the

court as given in its instructions. In a case as long drawn out as the present case is, it is inconceivable that the members of the jury would remember all the testimony with exactitude, and the observations of the court, coming as they did just prior to the retirement of the jury, may well have and probably did jog the faltering memory of more than one juror into error as to the exact testimony adduced.

That such an instruction is error has been recognized by this court in the case of Ward v. United States, 4 Fed. (2nd.) 772. In a similar case, Rossi v. United States, 9 Fed. (2nd), 362, the court says in its opinion reversing the trial court, P. 367:

> "* * *The effect on a jury of such a statement by the court would be to practically destroy the evidence of the defendant and of Calabrese as to defendant not meeting West on the 23rd. Juries give great weight to any statement by the court. It seems to us this erroneous statement of evidence by the court to the jury with the inevitable result of great prejudice to the defendant was so grave an error as to require a reversal of the case."

The same effect is here for undoubtedly the defendants were prejudiced by the comments of the court set forth above—comments which bore upon important and almost controlling testimony in the case—and the same should be reversed therefor.

VI.

Newly Discovered Evidence

Assignment XLIV.

The newly discovered evidence warranting reversal is set forth in the affidavits of R. W. Nelson (Tr. 763), Paul Dormitzer (Tr. 764), and Elton Watkins (Tr. 765). They bear out what the defendants have contended was the truth and if the jury knew said facts at the time it retired or if defendants could have examined the witnesses as to the matters therein contained, no doubt but that the defendants would have profited. It is enough to show this court that the defendants were framed and that government witnesses were bought and paid for.

Assignment XLV.

The things going before being of sufficient error, manifestly it was error to pronounce the sentence so pronounced, or any sentence.

Conclusion

Measured by every rule of law and logic we contend that the defendants have not had a fair and impartial trial. They have been good soldiers, they have been and now are good husbands, fathers and citizens. Those who cry for their conviction are men of the meanest type. But this court is only concerned with errors to the prejudice of the defendants, and we earnestly contend that mani-

fest and manifold errors exist, relating to attempted jury bribing, accusations of spiriting witnesses out of the state, admission and rejection of testimony, erroneous interpretation of facts in giving instructions, and the refusal of motions for mistrial and new trial, and all warranting a reversal. And finally, we sincerely believe that when this record has been read, the court will say justice is always more important than time, and it were better that a thousand guilty men go free than that one innocent man, a guilty man for that matter, be convicted wherein prejudice prevailed.

Respectfully submitted,

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